

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 4, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1159

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

LYLE L. SMITH AND DAWN SMITH,

PLAINTIFFS-APPELLANTS,

V.

KENNETH J. BOSVELD AND LINDA S. BOSVELD,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Green Lake County: WILLIAM M. MC MONIGAL, Judge. *Reversed and cause remanded.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

NETTESHEIM, J. This is a statute of frauds case. Lyle L. and Dawn Smith appeal from a summary judgment which dismissed their claims for: (1) specific performance of an agreement with Kenneth J. and Linda S. Bosveld for the conveyance of real estate from the Bosvelds to the Smiths; and (2)

equitable estoppel seeking to bar the Bosvelds from disavowing the agreement.¹ Although the parties did not execute a formal offer to purchase agreement, the Smiths contended that various writings evincing the transaction collectively satisfied the statute of frauds, § 706.02(1), STATS. The trial court disagreed and dismissed the Smiths' complaint.

We reverse the trial court's grant of summary judgment because we conclude that a genuine issue of material threshold fact exists as to the terms of the parties' agreement. In the absence of that determination, the trial court's determination of the statute of frauds and equitable estoppel issues was premature. We therefore reverse the judgment and remand for further proceedings.

FACTS

The summary judgment record is as follows. In early 1996, Lyle Smith learned that the Bosvelds had subdivided a parcel of land in the town of Brooklyn in Green Lake county. Lyle later met with Kenneth Bosveld to inspect the lots and to discuss a possible purchase of one of the lots. During their discussions, Kenneth showed Lyle a certified survey map which depicted four lots owned by the Bosvelds. Kenneth informed Lyle that he and his wife, Linda, resided on Lot 1, that they had commenced construction of a home on Lot 4 and that Lot 3 was available for sale. Lyle expressed interest in Lot 3 and informed Kenneth that if he and his wife, Dawn, purchased the lot they would begin

¹ The Smiths additionally requested relief from an agreement with Kenneth Bosveld for the construction of a home upon the property in question. Alternatively, the Smiths requested that the trial court reform the contract under § 706.04(1), STATS., to comply with the requirements under § 706.02, STATS., the statute of frauds. We deem these claims subsumed into the issue we address on this appeal.

construction of a single-family residence immediately. At that time, Kenneth told Lyle that he was a construction contractor and that he was in a position to both sell the property and construct a home for the Smiths.

According to Lyle, an oral agreement was then reached that the Smiths would purchase Lot 3 from the Bosvelds for \$7000. On April 11, 1996, Lyle paid Kenneth \$1000 in cash. Kenneth provided Lyle with a signed receipt acknowledging Lyle's \$1000 down payment "for Lot 3" and providing that the balance due was \$6000. Lyle and Kenneth shook hands following the transaction.

Kenneth's version of the agreement is different. He concedes that he and Lyle agreed on the sale of the lot, but that the agreement included a provision that Kenneth would construct a residence for the Smiths on the site.

On April 18, 1996, Lyle delivered a personal check for \$5000 to Kenneth as an additional payment towards the purchase price of the lot. The check was signed by Lyle's wife, Dawn. This check was never cashed by the Bosvelds.

On April 23, 1996, the Bosvelds' attorney submitted a request to the Waushara Abstract Corporation for a title insurance policy for Lot 3 in the amount of \$7000, naming Lyle and Dawn Smith as the proposed insureds. A copy of the commitment for title insurance was to be mailed to the Smiths' attorney.

On April 30, 1996, Lyle and Kenneth entered into a construction contract based on a discussion which occurred in the Bosvelds' kitchen. According to Lyle, he and Kenneth agreed that Lyle would perform part of the construction and that Lyle would pay Kenneth for any work Kenneth performed on a "time and materials" basis. Linda Bosveld was present during this discussion

and she wrote out a handwritten construction contract based on this discussion. Lyle and Kenneth signed the agreement.

After signing the construction contract, Lyle requested and received permission from Kenneth to begin excavating and landscaping Lot 3 prior to closing. Lyle thereafter employed an excavation company which began excavating the property in May. At this time, the Bosvelds' attorney contacted the Smiths' attorney requesting that the Smiths execute a formal offer to purchase and proposed construction contract prior to closing. The next day, the Smiths' attorney responded by a letter expressing his belief that an enforceable contract already existed for the sale of the property and the construction of the residence. The letter referenced the receipt which Lyle received from Kenneth on April 11 for \$1000 and the handwritten construction contract signed in the Bosvelds' kitchen on April 30. The Bosvelds' attorney replied that no enforceable contract existed regarding the sale of the property or the construction of the home. The letter additionally stated that "Ken Bosveld will not sell your client the lot [for \$7000], if he is not building the home." On May 24, the Smiths' attorney again replied, this time stating that the Smiths believed the contract was enforceable and that they intended to commence an action for specific performance. Further attempts to resolve the dispute failed. In July 1996, Lyle visited Lot 3 and noticed that the completed excavation work had been reversed.

The Smiths then commenced this action seeking various forms of relief including specific performance of the agreement and, alternatively, equitable estoppel barring the Bosvelds from disavowing the agreement. The Bosvelds denied the Smiths' allegations contending that the parties' agreement was unenforceable under the statute of frauds. The Bosvelds also alleged that they should not be estopped from asserting the statute of frauds defense because the

Smiths had not established all the terms and conditions of the parties' alleged agreement.

The Bosvelds then moved for summary judgment on the basis of the statute of frauds. The trial court granted the motion, concluding that the Smiths had failed to establish the existence of an enforceable real estate contract. The trial court ordered the Bosvelds to return the \$1000 down payment to the Smiths. The Smiths appeal.

DISCUSSION

“We review a motion for summary judgment using the same methodology as the trial court.” *M & I First Nat'l Bank v. Episcopal Homes Management, Inc.*, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995). *See also* § 802.08(2), STATS. “Although summary judgment presents a question of law which we review de novo, we nevertheless value a trial court's decision on such a question.” *M & I First Nat'l Bank*, 195 Wis.2d at 497, 536 N.W.2d at 182.

The methodology of summary judgment is well known, and we will not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See id.* at 496-97, 536 N.W.2d at 182. If a dispute of any material fact exists, or if the material presented on the motion is subject to conflicting factual interpretations or inferences, summary judgment must be denied. *See State Bank of La Crosse v. Elsen*, 128 Wis.2d 508, 512, 383 N.W.2d 916, 918 (Ct. App. 1986).

Statute of Frauds

The issue in this case is whether the transaction between the parties satisfies the requirements of § 706.02, STATS., the statute of frauds. The Smiths argue that the statute of frauds has been satisfied while the Bosvelds maintain that it has not. Each party argues that the trial court should have granted summary judgment in their respective favor.²

When a trial court rules on a statute of frauds question, it is implicit that the court know what the terms of the agreement are. Here, however, the parties' summary judgment affidavits are in sharp conflict as to the terms of their agreement. The Smiths contend that the agreement for the purchase of Lot 3 was separate and discrete from the construction agreement. Based on that argument, the Smiths contend that the collective writings satisfy the statute of frauds. The Bosvelds, however, contend that the sale of the lot was contingent on Kenneth constructing a dwelling on the property for the Smiths. They argue that this provision is not sufficiently documented under the statute of frauds.³ Indeed, the trial court, at one point, recognized this dispute. The court noted, "There is an issue, and I think [the Smiths' attorney] rightfully makes the issue, as to whether or not the parties intended that there be a tie-in between the construction contract and the purchase of the lot as the affidavits make some references."

² Section 802.08(6), STATS., allows the trial court to grant summary judgment to the opponent of a summary judgment motion even if the opponent has not moved for summary judgment. Here, even though the Smiths did not move for summary judgment, the trial court construed the proceedings as cross-motions for such relief.

³ Even if the agreement for the sale of Lot 3 was separate and discrete from the construction agreement, the Bosvelds contend that the statute of frauds for the sale of the lot is not satisfied.

Our supreme court has recognized that in some cases the application of the statute of frauds must await a factual determination as to what is the parties' agreement. See *Hilkert v. Zimmer*, 90 Wis.2d 340, 343, 280 N.W.2d 116, 118 (1979). In *Hilkert*, the court concluded that a grant of summary judgment based upon the application of the statute of frauds to a written contract was premature because material facts were in dispute regarding whether a contract had been orally modified. See *id.* at 342-43, 280 N.W.2d at 117. The court remanded for a trial to determine whether the facts supported the defendant's view that the contract had been orally modified, or the plaintiff's view that the written contract constituted the complete agreement. See *id.* at 343, 280 N.W.2d at 117.

The same situation exists here. The trial court's resolution of the statute of frauds question was premature because there is a sharp factual dispute as to the parties' actual agreement. We therefore are compelled to reverse and remand for a resolution of this dispute. Despite our ruling, we have considered whether we might assist the trial court (and perhaps avoid a further appeal) by deciding the statute of frauds issue under the alternative scenarios argued by the parties. That conditional decision would necessarily be limited to the existing summary judgment record. However, the further trial proceedings in this case may well vary, and will certainly expand, the existing summary judgment record. We therefore conclude that the ultimate decision regarding the statute of frauds must await a fact-finder's determination as to whether the parties' agreement was for the sale of the land only, the sale of the land conditioned upon Bosveld constructing the Smiths' residence, or any other variant thereof.

Equitable Estoppel

The above reasoning also governs the question of whether the Boswelds should be equitably estopped from asserting the statute of frauds

defense in this case. Before the trial court can determine where the equities lie as to this claim, the court must know the terms of the parties' agreement.

CONCLUSION

We conclude that a genuine issue of material fact exists as to the terms of the agreement between the Smiths and the Bosvelds. As such, the grant of summary judgment in this case as to both causes of action was premature. *See Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980) (“summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy”). Accordingly, we reverse the judgment and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.

